

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licensees)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

To: The Commission

COMMENTS OF NONCOMMERCIAL EDUCATIONAL BROADCAST LICENSEES

Arizona Board of Regents for Benefit of University of Arizona ("Arizona"), Board of Regents of the University of Wisconsin System ("UWS"), Boise State University ("BSU"), Central Michigan University ("CMU"), Iowa Public Broadcasting Board ("IPPB"), Kent State University ("KSU"), The Ohio State University ("OSU"), Ohio University ("OU"), St. Louis Regional Educational and Public Television Commission ("KETC"), State of Wisconsin - Educational Communications Board ("WECB"), and WAMC (collectively, the "NCE Broadcasters"), by their counsel, submit these comments in response to the Commission's *Notice of Proposed Rulemaking* in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket

No. 90-264, FCC 97-397 (“*NPRM*”), relating to the implementation of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which expanded the FCC's competitive bidding authority to include mutually exclusive license applications for certain types of broadcast stations.

The NCE Broadcasters agree with and support the other commenters in this proceeding opposing the application of competitive bidding to public broadcasters, as set forth in the separate filings by the Association of America's Public Television Stations (“APTS”), National Public Radio (“NPR”) and the National Federation of Community Broadcasters (“NFCB”).

Introduction

The NCE Broadcasters are public, universities and university systems, non-profit community licensees, statewide public broadcast networks or governmental educational telecommunications entities. The NCE Broadcasters are experienced licensees of public broadcasting stations providing noncommercial educational broadcast services. Some of these services are transmitted over channels or frequencies not reserved specifically for noncommercial educational use. The NCE Broadcasters currently use (or have future plans to use), AM channels, non-reserved band FM channels, non-reserved band FM translator channels, TV Translator channels, and non-reserved TV channels to fulfill the Congressional mandate in Section 396(a) of the Communications Act for the provision of noncommercial educational broadcasting services to the public. The NCE Broadcasters would be adversely affected if the Commission were to determine to auction mutually exclusive broadcast applications for these channels when one of the applicants is eligible to be licensed as, and has applied for, a

noncommercial educational broadcast station as defined by Section 397(6) of the Communications Act.

The Balanced Budget Act of 1997 Prohibits Competitive Bidding for Noncommercial Educational Broadcast Applications

In new Section 309(j)(2)(C), of the Communications Act of 1934, as amended, the Balanced Budget Act exempted certain types of applications from the competitive bidding process, including "stations described in Section 397(6) of this Act." Section 397(6) refers to "noncommercial educational broadcast stations" and "public broadcast stations" and defines those stations as TV or radio stations which, under the FCC's rules, are eligible to be licensed by the Commission for those services and are owned and operated by a public agency or nonprofit private foundation, corporation, or association.

The statutory prohibition against competitive bidding for noncommercial educational or public broadcasters is defined not by the frequencies or channels proposed to be used by those broadcasters, but by the eligibility of the applicant and its proposed use of the frequencies or channels. Had Congress sought to limit the exemption to applications for channels "reserved" for noncommercial educational use, it could have done so. It did not.

Yet, the Commission's *NPRM* proposes that only a subcategory of noncommercial educational broadcast stations be exempt from competitive bidding -- those stations that would use a channel or frequency specifically reserved for noncommercial educational use. This proposal contradicts the express language of the noncommercial educational exemption in Section 309(j)(2)(C) and undermines the congressional declarations of support for "public

telecommunications services" in Section 396(a) of the Communications Act. Moreover, the proposal is contrary to public policy.

The Commission should implement Congress's explicit language and obvious intent by exempting from competitive bidding any applications for stations described under Section 397(6) of the Communications Act, regardless of whether the frequency or channel is reserved or there are also "commercial" applicants for the spectrum. The Commission should determine, in a prompt manner, what other method should be used to decide among mutually exclusive applicants that propose to use a channel on a noncommercial educational basis versus a commercial basis.^{1/}

Auctioning Frequencies Proposed for Noncommercial Educational Use Would Be Contrary to the Public Interest

Given the substantial federal investment in public broadcasting through the Corporation of Public Broadcasting ("CPB") and the Public Telecommunications Facilities Program of NTIA, Department of Commerce ("PTFP"), as well as the substantial state and public monies that support public broadcasting on statewide, regional and local levels, it would be contrary to public policy to force state governmental entities and non-profit corporations, such as the NCE Broadcasters, to engage in competitive bidding for channels intended to be used on a noncommercial educational basis.

^{1/} In this regard, we note that the Commission has not yet concluded the long-pending rulemaking proceeding in *Reexamination of the Comparative Standards for New Noncommercial Educational Applicants*, 10 FCC Rcd 2877 (1995). Thus, at this time, the NCE Broadcasters and the public are doubly disadvantaged in that mutually exclusive proposals for new broadcast station on "reserved" channels cannot be decided and new public broadcasting services on those reserved channels cannot commence.

Moreover, it does not make logical sense, because at least two classes of service encompassed by the competitive bidding proposal -- AM radio stations and TV translator stations -- have no channels "reserved" specifically for noncommercial educational use.^{2/} Another class of service -- FM translator -- has some channels set aside for noncommercial educational use, but the majority of nonreserved channels are used by noncommercial broadcasters due to the eligibility restrictions on FM translators imposed in Section 74.1232 of the FCC rules. Several of the NCE Broadcasters, such as Arizona, BSU and WAMC, use nonreserved band FM translator stations to extend public radio service to unserved areas. Existing commercial broadcasters are only permitted to use translators on a "fill-in" basis. Thus, it is no surprise that noncommercial broadcasters, in general, use more of the FM translator spectrum and would be adversely affected if that spectrum is subject to competitive bidding, even where there is a noncommercial educational reservation for FM translators on Channels 200-220.

The NCE Broadcasters have pending several applications for nonreserved frequencies which, if subject to competitive bidding, would demonstrate the adverse public policy results from application of the Commission's proposal to auction mutually exclusive applications. For example:

Central Michigan University has a pending application for a new noncommercial educational FM station on a nonreserved channel in Traverse City, Michigan. Its application is mutually exclusive with five other applications. Three of the six applicants are seeking noncommercial educational broadcast stations, as defined by Section 397(6) of the

^{2/} We note that several of the NCE Broadcasters operate historic "pioneer" AM stations that are part of early broadcasting history.

Communications Act. Each of the noncommercial educational applicants are existing broadcasters seeking to provide new noncommercial service to the Traverse City area. Currently noncommercial educational FM radio service in the area is limited due to the presence of TV Channel 6 interference and Canadian FM allocations, which preclude use of reserved band channels in the Traverse City area. Use of competitive bidding to decide among the six applicants would thwart the public interest by disadvantaging the noncommercial applicants in an area needing such noncommercial educational service.

Iowa Public Broadcasting Board ("IPPB"), a state entity responsible for public television service in Iowa, has a pending application for a new NTSC television station on a nonreserved channel in Davenport, Iowa that is mutually exclusive with two other applications -- one by another public broadcaster and one by a commercial broadcaster. IPBB applied for the station in order to overcome possible loss of service in the Davenport area due to the "cliff effect" anticipated to be encountered with digital television facilities. Use of competitive bidding would thwart the public interest by disadvantaging continued public television service in a digital environment.

State of Wisconsin - Educational Communications Board ("WECB") has a pending application for a new "fill-in" FM translator station on a nonreserved channel in Milwaukee. WECB's translator is necessary to ensure adequate reception service of WECB's noncommercial educational Radio Station WHAD-FM in parts of Milwaukee. WECB's application is mutually exclusive with another "fill-in" application by a commercial broadcaster. In this instance, the translator channel should not be awarded by competitive bidding, which would disadvantage WECB. Otherwise, a commercial translator applicant -- operating its stations on a for-profit

basis and not subject to state budgetary processes -- would have a built-in advantage over a governmental applicant like WECB.

In addition, WECB has plans to use other nonreserved band FM frequencies to fulfill its statewide plan for the provision of noncommercial educational radio service. In the Northern Wisconsin area, use of FM reserved band channels is precluded by the presence of TV Channel 6 interference and Canadian allocations. Even if a state agency like WECB would be permitted to engage to competitive bidding (which is not clear), WECB would be disadvantaged in its quest to provide public broadcasting service to all the residents of its state if forced to compete against for-profit entities for frequencies.

WAMC currently has a noncommercial educational FM radio station on a nonreserved channel. If WAMC were to seek modification of that station (major or minor), either for necessity or desire, and encounter a mutually exclusive application, the Commission's proposal would require competitive bidding. Thus, WAMC's investment (and the corresponding federal investment through CPB funding) in the continued successful operation of its station would be jeopardized by requiring competitive bidding.

KETC has a pending application for a new noncommercial educational television station on Channel 52 in St. Louis, Missouri. KETC filed this application in conjunction with a petition for rulemaking seeking to allot reserved Channel *52 to St. Louis, Missouri in lieu of vacant reserved Channel *42 which has been rendered unusable by the Commission's proposed digital television Table of Allotments. If the Commission determined not to reserve Channel *52 for noncommercial educational use and if mutually exclusive commercial television applications were filed for Channel 52 in St. Louis, KETC would face the possibility of competing against

commercial television applicants for a channel that had been originally intended for noncommercial educational use. Thus, KETC's efforts to create an "alternative" public television voice in the Greater St. Louis area could be thwarted if it were forced to bid against a commercial television application for channel.

CMU, OU and WECB have TV Translator stations on Channels 60-69 which will be displaced by the recent reallocation of that spectrum or by the transition to digital television. If these entities were forced to bid against other displaced TV translator/LPTV applicants for scarce frequencies during and after DTV transition, the continued provision of public television service to these areas could be jeopardized.

These examples demonstrate that the public interest is not well served by auctioning channels when one of the applicant proposes to use the channel on a noncommercial educational basis while other applicants propose commercial uses. The Commission cannot subject these situations to competitive bidding without violating the bedrock public interest principles that have guided the Commission in deciding between competing mutually exclusive applications.

Competitive Bidding Should Not be Applied
to Pending Applications or Modification Applications

Even if the FCC determines that the Balanced Budget Act does in fact require it to use competitive bidding procedures to decide mutually exclusive cases for applications proposing noncommercial educational broadcast stations filed after July 1, 1997, the Act is clear that the FCC has discretion not to apply these procedures to pre-July 1, 1997 applications. New Section 309(l) of the Communications Act provides that the FCC shall "have the authority" to conduct competitive bidding to select among pre-July 1, 1997 competing applications "for initial licenses

or construction permits for commercial radio or television stations...." This language differs markedly from the provisions of Section 309(j), which clearly requires competitive bidding for post-Balanced Budget Act applications. The Commission should exercise its discretion not to apply competitive bidding to any competing application proposing a noncommercial educational broadcast station filed prior to July 1, 1997.

Moreover, from the language of both Section 309(j) and 309(l), which in each case refers to "initial" licenses or construction permits, it also seems clear that the FCC does not have either the mandate, or the authority, to use competitive bidding for mutually exclusive situations involving applications for modifications to existing facilities.^{3/}

CONCLUSION

For the reasons stated above, the Commission is precluded from subjecting applicants proposing noncommercial educational stations to competitive bidding. Moreover, as demonstrated by examples provided by the NCE Broadcasters in these comments, it is not sound public policy to apply competitive bidding to applications proposing to use a channel for a noncommercial educational broadcast station regardless of whether the channel is reserved or nonreserved.

Respectfully submitted,

ARIZONA BOARD OF REGENTS FOR
BENEFIT OF THE UNIVERSITY
OF ARIZONA

^{3/} The NCE Broadcasters believe that if any application in a mutually exclusive situation is a modification application, and thus not "auctionable," competitive bidding may not legally be applied in that situation.

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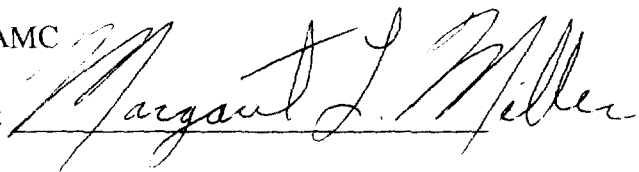
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